

AMENDED IN ASSEMBLY MARCH 30, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

ASSEMBLY BILL

No. 341

Introduced by Assembly Member Huff

February 10, 2005

An act to amend Section 7108.5 of the Business and Professions Code, to amend Sections 3260 and 3260.1 of the Civil Code, and to amend Sections 7107 and 10262.5 of the Public Contract Code, relating to works of improvement.

LEGISLATIVE COUNSEL'S DIGEST

AB 341, as amended, Huff. Works of improvement: disputed amounts.

Existing law contains various provisions relating to contracts for the performance of private and public works of improvement, including provisions for the withholding and disbursement of retention proceeds. Existing law provides that, with respect to those contracts for works of improvement, the retention proceeds withheld from any payment may not exceed 150% of the disputed amount.

This bill would increase the amount that may be withheld from progress payments or final payments, depending on the circumstances, to a sum of various amounts and percentages, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 7108.5 of the Business and Professions
- 2 Code is amended to read:

1 7108.5. (a) A prime contractor or subcontractor shall pay to
2 any subcontractor, not later than 10 days of receipt of each
3 progress payment, unless otherwise agreed to in writing, the
4 respective amounts allowed the contractor on account of the
5 work performed by the subcontractors, to the extent of each
6 subcontractor's interest therein. In the event that there is a good
7 faith dispute over the amount due on a progress payment, the
8 prime contractor or subcontractor may withhold from the
9 progress payment an amount not to exceed the sum of both of the
10 following:

11 (1) The liquidated damages owed by the subcontractor.

12 (2) One hundred fifty percent of the estimated cost of repair or
13 replacement of subcontract work that was not performed
14 according to the subcontract.

15 (b) Any violation of this section shall constitute a cause for
16 disciplinary action and shall subject the licensee to a penalty,
17 payable to the subcontractor, of 2 percent of the amount due per
18 month for every month that payment is not made. In any action
19 for the collection of funds wrongfully withheld, the prevailing
20 party shall be entitled to his or her attorney's fees and costs.

21 (c) The sanctions authorized under this section shall be
22 separate from, and in addition to, all other remedies either civil,
23 administrative, or criminal.

24 (d) This section applies to all private works of improvement
25 and to all public works of improvement, except where Section
26 10262 of the Public Contract Code applies.

27 SEC. 2. Section 3260 of the Civil Code is amended to read:

28 3260. (a) This section is applicable with respect to all
29 contracts entered into on or after July 1, 1991, relating to the
30 construction of any private work of improvement. However, the
31 amendments made to this section during the 1992 portion of the
32 1991–92 Regular Session of the Legislature are applicable only
33 with respect to contracts entered into on or after January 1, 1993,
34 relating to the construction of any private work of improvement.
35 Moreover, the amendments made to this section during the 1993
36 portion of the 1993–94 Regular Session of the Legislature are
37 applicable only with respect to contracts entered into on or after
38 January 1, 1994, relating to the construction of any private work
39 of improvement.

1 (b) The retention proceeds withheld from any payment by the
2 owner from the original contractor, or by the original contractor
3 from any subcontractor, shall be subject to this section.

4 (c) Within 45 days after the date of completion, the retention
5 withheld by the owner shall be released. "Date of completion,"
6 for purposes of this section, means any of the following:

7 (1) The date of issuance of any certificate of occupancy
8 covering the work by the public agency issuing the building
9 permit.

10 (2) The date of completion indicated on a valid notice of
11 completion recorded pursuant to Section 3093.

12 (3) The date of completion as defined in Section 3086.

13 However, release of retentions withheld for any portion of the
14 work of improvement which ultimately will become the property
15 of a public agency, may be conditioned upon the acceptance of
16 the work by the public agency. In the event of a dispute between
17 the owner and the original contractor, the owner may withhold
18 from the final payment an amount not to exceed the sum of all of
19 the following:

20 (A) The liquidated damages owed by the contractor.

21 (B) The amounts that may be withheld pursuant to Section
22 3153.

23 (C) One hundred fifty percent of the estimated cost of
24 uncompleted contract work, *except for those costs that are*
25 *withheld under subparagraph (B).*

26 (D) One hundred fifty percent of the estimated cost to repair or
27 replace contract work that was not performed according to the
28 contract, *except for those costs that are withheld under*
29 *subparagraph (B) or (C).*

30 (d) Subject to subdivision (e), within 10 days from the time
31 that all or any portion of the retention proceeds are received by
32 the original contractor, the original contractor shall pay each of
33 its subcontractors from whom retention has been withheld, each
34 subcontractor's share of the retention received. However, if a
35 retention payment received by the original contractor is
36 specifically designated for a particular subcontractor, payment of
37 the retention shall be made to the designated subcontractor, if the
38 payment is consistent with the terms of the subcontract.

39 (e) If a bona fide dispute exists between a subcontractor and
40 the original contractor, the original contractor may withhold from

1 that subcontractor with whom the dispute exists its portion of the
2 retention proceeds. The amount withheld from the retention
3 payment shall not exceed the sum of all of the following:

4 (1) The liquidated damages owed by the subcontractor.

5 (2) That portion of any mechanic's lien or stop notice claim by
6 the subcontractor for which the subcontractor has already been
7 paid.

8 (3) One hundred fifty percent of the estimated cost of
9 uncompleted subcontract work, *except for those costs that are*
10 *withheld under paragraph (2).*

11 (4) One hundred fifty percent of the estimated cost to repair or
12 replace subcontract work that was not performed according to the
13 subcontract, *except for those costs that are withheld under*
14 *paragraph (2) or (3).*

15 (f) Within 10 days of receipt of written notice by the owner
16 from the original contractor or by the original contractor from the
17 subcontractor, as the case may be, that any work in dispute has
18 been completed in accordance with the terms of the contract, the
19 owner or original contractor shall advise the notifying party of
20 the acceptance or rejection of the disputed work. Within 10 days
21 of acceptance of the disputed work, the owner or original
22 contractor, as the case may be, shall release the retained portion
23 of the retention proceeds.

24 (g) In the event that retention payments are not made within
25 the time periods required by this section, the owner or original
26 contractor withholding the unpaid amounts shall be subject to a
27 charge of 2 percent per month on the improperly withheld
28 amount, in lieu of any interest otherwise due. Additionally, in
29 any action for the collection of funds wrongfully withheld, the
30 prevailing party shall be entitled to his or her attorney's fees and
31 costs.

32 (h) It shall be against public policy for any party to require any
33 other party to waive any provision of this section.

34 (i) This section shall not be construed to apply to retentions
35 withheld by a lender in accordance with the construction loan
36 agreement.

37 SEC. 3. Section 3260.1 of the Civil Code is amended to read:

38 3260.1. (a) This section is applicable with respect to all
39 contracts entered into on or after January 1, 1992, relating to the
40 construction of any private work of improvement.

(b) Except as otherwise agreed in writing, the owner shall pay to the contractor, within 30 days following receipt of a demand for payment in accordance with the contract, any progress payment due thereunder as to which there is no good faith dispute between the parties. In the event of a dispute between the owner and the contractor, the owner may withhold from the progress payment an amount not to exceed the sum of both of the following:

(1) The liquidated damages owed by the contractor.

(2) One hundred fifty percent of the estimated cost of repair or replacement of contract work that was not performed according to the contract.

If any amount is wrongfully withheld in violation of this subdivision, the contractor shall be entitled to the penalty specified in subdivision (g) of Section 3260.

(c) Nothing in this section shall be deemed to supersede any requirement of Section 3260 respecting the withholding of retention proceeds.

SEC. 4. Section 7107 of the Public Contract Code is amended to read:

7107. (a) This section is applicable with respect to all contracts entered into on or after January 1, 1993, relating to the construction of any public work of improvement.

(b) The retention proceeds withheld from any payment by the public entity from the original contractor, or by the original contractor from any subcontractor, shall be subject to this section.

(c) (1) Within 60 days after the date of completion of the work of improvement, the retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed the sum of all of the following:

(A) The liquidated damages owed by the original contractor.

(B) The amounts that may be withheld pursuant to Section 3186.

(C) One hundred fifty percent of the estimated cost of uncompleted contract work, *except for those costs that are withheld under subparagraph (B).*

1 (D) One hundred fifty percent of the estimated cost to repair or
2 replace contract work that was not performed according to the
3 contract, *except for those costs that are withheld under*
4 *subparagraph (B) or (C).*

5 (E) One hundred fifty percent of the estimated cost of claims
6 made by third parties for which the contractor is obligated to
7 indemnify the public entity.

8 (F) One hundred fifty percent of the estimated cost to be
9 incurred by the public entity as a result of the contractor's
10 abandonment or material default of the contract, *except for those*
11 *costs that are withheld under subparagraph (B), (C), or (D).*

12 (G) The amounts that may be withheld in accordance with
13 other provisions of law, including Section 1727 of the Labor
14 Code and Section 4110 of this code.

15 (2) For purposes of this subdivision, "completion" means any
16 of the following:

17 (A) The occupation, beneficial use, and enjoyment of a work
18 of improvement, excluding any operation only for testing,
19 startup, or commissioning, by the public agency, or its agent,
20 accompanied by cessation of labor on the work of improvement.

21 (B) The acceptance by the public agency, or its agent, of the
22 work of improvement.

23 (C) After the commencement of a work of improvement, a
24 cessation of labor on the work of improvement for a continuous
25 period of 100 days or more, due to factors beyond the control of
26 the contractor.

27 (D) After the commencement of a work of improvement, a
28 cessation of labor on the work of improvement for a continuous
29 period of 30 days or more, if the public agency files for record a
30 notice of cessation or a notice of completion.

31 (d) Subject to subdivision (e), within seven days from the time
32 that all or any portion of the retention proceeds are received by
33 the original contractor, the original contractor shall pay each of
34 its subcontractors from whom retention has been withheld, each
35 subcontractor's share of the retention received. However, if a
36 retention payment received by the original contractor is
37 specifically designated for a particular subcontractor, payment of
38 the retention shall be made to the designated subcontractor, if the
39 payment is consistent with the terms of the subcontract.

1 (e) The original contractor may withhold from a subcontractor
2 its portion of the retention proceeds if a bona fide dispute exists
3 between the subcontractor and the original contractor. The
4 amount withheld from the retention payment shall not exceed the
5 sum of all of the following:

6 (1) The liquidated damages owed by the subcontractor.

7 (2) That portion of any stop notice claim by the subcontractor
8 for which the subcontractor has already been paid.

9 (3) One hundred fifty percent of the estimated cost of
10 uncompleted subcontract work, *except for those costs that are*
11 *withheld under paragraph (2) or (5).*

12 (4) One hundred fifty percent of the estimated cost to repair or
13 replace subcontract work that was not performed according to the
14 subcontract, *except for those costs that are withheld under*
15 *paragraph (2), (3), or (5).*

16 (5) The amounts withheld by the public entity on account of
17 acts or omissions of the subcontractor.

18 (f) In the event that retention payments are not made within
19 the time periods required by this section, the public entity or
20 original contractor withholding the unpaid amounts shall be
21 subject to a charge of 2 percent per month on the improperly
22 withheld amount, in lieu of any interest otherwise due.
23 Additionally, in any action for the collection of funds wrongfully
24 withheld, the prevailing party shall be entitled to attorney's fees
25 and costs.

26 (g) If a state agency retains an amount greater than 125
27 percent of the estimated value of the work yet to be completed
28 pursuant to Section 10261, the state agency shall distribute
29 undisputed retention proceeds in accordance with subdivision (c).
30 However, notwithstanding subdivision (c), if a state agency
31 retains an amount equal to or less than 125 percent of the
32 estimated value of the work yet to be completed, the state agency
33 shall have 90 days in which to release undisputed retentions.

34 (h) Any attempted waiver of the provisions of this section
35 shall be void as against the public policy of this state.

36 SEC. 5. Section 10262.5 of the Public Contract Code is
37 amended to read:

38 10262.5. (a) Notwithstanding any other provision of law, a
39 prime contractor or subcontractor shall pay to any subcontractor,
40 not later than 10 days of receipt of each progress payment, the

1 respective amounts allowed the contractor on account of the
2 work performed by the subcontractors, to the extent of each
3 subcontractor's interest therein. In the event that there is a good
4 faith dispute over the amount due on a progress payment, the
5 prime contractor or subcontractor may withhold from the
6 progress payment an amount not to exceed the sum of both of the
7 following:

8 (1) The liquidated damages owed by the subcontractor.

9 (2) One hundred fifty percent of the estimated cost of repair or
10 replacement of the subcontract work that was not performed
11 according to the subcontract.

12 Any contractor who violates this section shall pay to the
13 subcontractor a penalty of 2 percent of the amount due per month
14 for every month that payment is not made. In any action for the
15 collection of funds wrongfully withheld, the prevailing party
16 shall be entitled to his or her attorney's fees and costs.

17 (b) This section shall not be construed to limit or impair any
18 contractual, administrative, or judicial remedies otherwise
19 available to a contractor or a subcontractor in the event of a
20 dispute involving late payment or nonpayment by a contractor or
21 deficient subcontract performance or nonperformance by a
22 subcontractor.

23 (c) On or before September 1 of each year, the head of each
24 state agency shall submit to the Legislature a report on the
25 number and dollar volume of written complaints received from
26 subcontractors and prime contractors on contracts in excess of
27 three hundred thousand dollars (\$300,000), relating to violations
28 of this section.